JD–75–16
Waynesboro, GA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

SOUTHERN NUCLEAR OPERATING COMPANY, INC.

and **Cases 10–CA–159167**
10–CA–168661

INTERNATIONAL UNION, SECURITY, POLICE AND FIRE PROFESSIONALS OF AMERICA (SPFPA), LOCAL UNION NO. 580

Carla Wiley, Esq.,
for the General Counsel.
Michael Kaufman and James McCabe, Esqs.,
for the Respondent.

DECISION

GEOFFREY CARTER, Administrative Law Judge. The central question in this case is whether an employer, during the period after a union is recognized but before a first contract or an interim grievance procedure is in place, has an obligation under the National Labor Relations Act (the Act) to notify and bargain with the union before taking certain types of discretionary disciplinary action against employees. The General Counsel and the International Union, Security, Police and Fire Professionals of America (SPFPA), Local Union No. 580 (the Union) argue that employers do have such an obligation based on the reasoning in the Board's decision in *Alan Ritchey, Inc.*, 359 NLRB No. 40 (2012). Southern Nuclear Operating Company, Inc. (Respondent), on the other hand, argues that the *Alan Ritchey* decision is no longer good law because it was decided when the Board lacked a proper quorum (two of the Board members who participated in *Alan Ritchey* were serving under recess appointments that were later deemed invalid in *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014)). Thus, Respondent argues, the controlling case is *Fresno Bee*, 337 NLRB 1161 (2002), a case in which the Board adopted the judge's ruling that the employer had no obligation to notify the union and bargain before imposing discipline.

As explained below, I agree with Respondent that *Fresno Bee* is the controlling case on the issue presented here, and I accordingly recommend that remaining allegations in the complaint be dismissed.

STATEMENT OF THE CASE

This case was tried in Waynesboro, Georgia on June 13, 2016. The Union filed the charge in Case 10–CA–159167 on August 31, 2015, and amended that charge through filings on September 22 and December 28, 2015. The Union filed the charge in Case 10–CA–168661 on January 29, 2016.

On May 5, 2016, the General Counsel issued a consolidated complaint covering both of the cases listed above. In the consolidated complaint (after various amendments),[1] the General Counsel alleged that Respondent violated Section 8(a)(5) and (1) of the Act by suspending, disciplining and/or terminating six nuclear security officers, without providing adequate (if any) notice to the Union and without giving the Union an opportunity to bargain about the disciplinary decisions and the effects of those decisions. Respondent filed a timely answer denying the alleged violations in the consolidated complaint.

On the entire record,[2] including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT[3]

I. JURISDICTION

Respondent, a Delaware corporation with an office and place of business in Waynesboro, Georgia, operates a nuclear power facility (Plant Vogtle). In the past 12 months, Respondent, in conducting operations at Plant Vogtle, purchased and received goods at its Waynesboro, Georgia facility that are valued in excess of $50,000 and come directly from suppliers located outside the State of Georgia. Respondent admits, and I find, that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Respondent also admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

[1] In light of a settlement that resolved some of the allegations in the consolidated complaint, the General Counsel moved at the start of trial to amend the consolidated complaint by removing paragraphs 6, 7, 11, 12, 13, 14, 15 and a portion of paragraph 20 that referenced paragraph 14. Respondent did not oppose, and thus I granted, the General Counsel's request. (Transcript (Tr.) 6–7.)

[2] The transcripts and exhibits in this case generally are accurate, but I hereby make the following corrections to the record: p. 57, l. 23: "Boah" should be "Bowen"; p. 80, l. 13: "Boah" should be "Bowen"; and Joint Exhibit 29: the last page of the exhibit concerns the General Counsel's investigation of a discharge unrelated to this case and should be disregarded and removed from the record because that page was attached to the exhibit in error.

[3] Although I have included several citations in this decision to highlight particular testimony or exhibits in the evidentiary record, I emphasize that my findings and conclusions are not based solely on those specific citations, but rather are based on my review and consideration of the entire record for this case.

II. Alleged Unfair Labor Practices

A. Respondent's Nuclear Security Officers

Respondent employs approximately 175 armed nuclear security officers at Plant Vogtle who protect the facility and the public from internal and external threats of theft of nuclear material, as well as threats of radiological sabotage. Respondent's security force is subject to oversight by the Nuclear Regulatory Commission (NRC), and thus completes a variety of periodic inspections and evaluations. (Tr. 40–43, 90–91; Jt. Exh. 2 (pars. 40, 43).)

NRC regulations require Respondent to have a program in place to provide "high assurance" that all individuals (including nuclear security officers) who are granted unescorted access to the protected areas of the facility "are trustworthy and reliable, such that they do not constitute an unreasonable risk to public health and safety or the common defense and security, including the potential to commit radiological sabotage." (Jt. Exh. 4 (10 CFR § 73.56 (c).) In connection with that requirement, Respondent must maintain a behavioral observation program that is designed to detect behaviors or activities of coworkers and any other individuals who gain access to the facility that may constitute an unreasonable risk to the health and safety of the public and common defense and security. (Jt. Exh. 2 (par. 46); Jt. Exh. 4 (10 CFR § 73.56(f)).)

Respondent's behavioral observation program is set forth in Respondent's fitness for duty policy. Under the behavioral observation program, Respondent's employees must notify supervision, management or medical and fitness for duty personnel "if an individual's observed behavior raises a concern regarding the possible use, sale, distribution, or possession of illegal drugs on or off site; the possible possession or consumption of alcohol on site; or impairment from any cause which in any way could adversely affect the individual's ability to safely and competently perform his or her duties." (Jt. Exh. 2 (pars. 46–47); see also Jt. Exh. 5; R. Exh. 1; Tr. 48–49, 64–65.)

More broadly, Respondent's fitness for duty policy aims to ensure that all employees (including nuclear security officers) at the facility are reliable, trustworthy and fit for duty. To that end, Respondent's employees: may be randomly tested for the use of drugs or alcohol; must report any formal legal action taken by a law enforcement authority or court of law related to the use, sale or possession of illegal drugs, the abuse of legal drugs or alcohol, or the refusal to take a drug or alcohol test; and receive periodic training on the fitness for duty policy and the behavioral observation program. Respondent may remove an employee from duty if it determines that there are questions about the individual's fitness for duty and/or the ability of the employee to safely and competently perform his or her duties. Employees who violate the fitness for duty policy are subject to sanctions and discipline up to and including immediate termination. (Jt. Exh. 2 (par. 48); Jt. Exhs. 5, 10; R. Exh. 1; Tr. 71; see also Jt. Exh. 4 (explaining the assessments and training that nuclear security officers and other employees must complete to receive and maintain authorization for unescorted access to the facility).)

B. Respondent's Disciplinary Policy and Procedures

Since 1991, Respondent has maintained "positive discipline" guidelines. Under those guidelines, Respondent may use informal "coaching" conversations to "encourage optimum performance or address an emerging performance problem before formal discipline is required."[4] If formal discipline is warranted, Respondent may take the following disciplinary action, depending on the circumstances:

- Oral reminder – documented and remains active for 6 months;[5]
- Written reminder – documented and remains active for 12 months;
- Decision making leave (employee given a work day off, with pay, to consider the circumstances that led to the discipline, and then must either resign or commit to meeting all performance expectations) – documented and remains active for 18 months; or
- Discharge

(Jt. Exh. 6; see also Jt. Exh. 2 (pars. 50, 52).)

If necessary, Respondent may place an employee on paid administrative leave (a.k.a. paid contingency leave) while Respondent investigates serious infractions or alleged infractions including, but not limited to, theft, fighting, fitness for duty, certain safety violations, insubordination and alleged criminal involvement. Employees who are placed on paid administrative leave are only paid 8 hours of wages for each day of leave (up to 40 hours per week), and thus do not receive any additional compensation for overtime work or holiday pay that they miss out on during administrative leave. (Jt. Exh. 2 (par. 51); Jt. Exh. 6; Tr. 92–93, 95)

In practice and using its discretion depending on the circumstances, Respondent may place a nuclear security officer on paid administrative leave if Respondent questions, and thus needs to investigate, whether there is a high assurance that the nuclear security officer is trustworthy and reliable. Under those circumstances, Respondent must withdraw the nuclear security officer's authorization for unescorted access to the facility until it completes its investigation. (Tr. 28–31, 35–37, 44–46, 50 (discussing 10 CFR § 73.56).)

C. Collective-Bargaining History

On March 27, 2015, the Board certified the Union as the exclusive collective-bargaining representative for the following appropriate bargaining unit at Respondent's Plant Vogtle facility:

> All full-time and regular part-time armed and unarmed Nuclear Security Officers performing guard duties as defined in Section 9(B)(3) of the National Labor

[4] A supervisor may document a coaching for future reference. (Tr. 93–94.)

[5] If an employee does not correct the problem or commits a similar infraction while he or she has an active discipline on their record, then Respondent's guidelines state that "discipline should be escalated to the next level unless discharge is warranted." On the other hand, if the employee corrects the problem, then the disciplinary letter will be removed from the employee's personnel file at the end of the "active" time frame, and will be given to the employee with verbal recognition for improving. (Jt. Exh. 6.)

> Relations Act, employed by Southern Nuclear Operating Company at Plant Vogtle One and Two, located at 7821 River Road, Waynesboro, Georgia, excluding: all office clerical employees, professional employees, and supervisors as defined by the Act.

(Jt. Exh. 2 (pars. 32–34); see also Tr. 92.)

On June 12, 2015, the Union sent a letter about "a number of 'discipline' cases" at Plant Vogtle that had occurred since the Board certified the Union as the collective-bargaining representative for Respondent's nuclear security officers. Citing the Board's decision in *Alan Ritchey*, 359 NLRB No. 40 (2012), the Union requested bargaining on all discipline that Respondent issued since March 2015, and asked Respondent to provide assorted information (e.g., the nuclear security officer's personnel file and disciplinary records) related to each of those instances of discipline. The Union also requested "notification of, and bargaining, on all future discipline (prior to implementation) until such time as the parties negotiate a disciplinary process and the collective bargaining agreement shall set procedure." (Jt. Exh. 27; see also Jt. Exh. 2 (par. 37).)

On June 24, 2015, Respondent replied to the Union's June 12 letter. In its letter, Respondent asserted that it did not have an obligation to bargain with the Union before issuing discipline because the decision in *Alan Ritchey* was rendered invalid by the Supreme Court's decision in *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014)). Respondent added that it believed the Board's decision in *Fresno Bee*, 337 NLRB 1161 (2002) remained the controlling law and established that "employers do not have an obligation to bargain in situations like the one presented here." Respondent suggested, however, that the parties could discuss the Union's concerns about past and future discipline in early bargaining sessions. (Jt. Exh. 28; see also Jt. Exh. 2 (par. 38).)

On July 6, the Union sent a letter to Respondent. The Union asserted that the rule announced in *Alan Ritchey* was "good labor relations policy," and that the Union had an interest in determining Respondent's disciplinary policies and practices. The Union also renewed its request that Respondent provides information necessary for the Union to prepare for bargaining and to represent disciplined employees. (Jt. Exh. 29; see also Jt. Exh. 2 (par. 39).)

The Union and Respondent began bargaining for their first collective-bargaining agreement in July 2015, but at the time of trial had not yet agreed on an initial collective-bargaining agreement or interim grievance or arbitration procedures. (Jt. Exh. 2 (par. 35).)

D. Taniko Chatman – Investigation, Discipline and Discharge

Taniko Chatman worked for Respondent as a nuclear security officer, starting his employment with Respondent in 2011. (Jt. Exh. 2 (pars. 53).)

On April 2, 2015, one of Respondent's employees (W1) made comments to Captain Calvin Jackson that implied that a nuclear security officer (S1) misused drugs and solicited prescription pain medication from four other nuclear security officers (W1, W2, W3 and Chatman). (Jt. Exh. 2 (par. 54).)

Based on W1's comments, Respondent opened an investigation on April 2, 2015, and interviewed Chatman, W2 and W3.[6] In a signed statement dated April 2, 2015, Chatman indicated that, on the way home from work in November or December 2014, S1 asked Chatman if Chatman had any pain medication for S1's toothache. Chatman also stated that once he and S1 arrived at Chatman's home, Chatman suggested that S1 take a couple of over the counter ibuprofen, and that S1 took the entire bottle of ibuprofen from Chatman's home without Chatman's permission. (Jt. Exh. 2 (pars. 54–55); Jt. Exh. 12 (p. 1); Tr. 51–53.)

Later on April 2, 2015, Respondent placed Chatman, W1, W2 and W3 on paid administrative leave pending the outcome of the investigation, and also withdrew their access to the protected area of the facility because Respondent did not have high assurance that Chatman, W1, W2, and W3 were trustworthy and reliable in performing their duties. (Jt. Exh. 2 (pars. 56, 58); Tr. 50–51.)

On April 8, 2015, Respondent's investigators separately interviewed Chatman, W1, W2 and W3. Chatman again reported that in November or December 2014, S1 took a bottle of ibuprofen from Chatman's home without permission. Chatman added, however, that in March 2015, S1 asked Chatman if he was willing to sell some pain medication that Chatman received after a dental appointment. Chatman stated that he declined S1's request to buy the pain medication because Chatman needed the medication for himself. Chatman conceded that he should have reported his observations about S1's behavior to a supervisor under Respondent's behavioral observation program. (Jt. Exh. 2 (pars. 59–60.); Jt. Exh. 12 (pp. 2–3).)[7]

On or about May 6, 2015, Respondent notified Chatman, W1, W2 and W3 that they could return to duty. Respondent did not discipline Chatman, W1, W2 or W3. Chatman also completed training on Respondent's fitness for duty policy and behavioral observation program, and on or about May 22, 2015, Respondent coached Chatman on the importance of reporting issues to supervision and how not doing so affected his trustworthiness and reliability. (Jt. Exh. 2 (par. 61.); Tr. 53, 62, 71–73, 75–76; see also Jt. Exh. 10 (indicating that Chatman also completed training on Respondent's fitness for duty policy in May 2014); R. Exh. 2 (referencing the May 22 coaching).)

On June 4, 2015, Respondent's investigators interviewed S1. S1 stated that in December 2014, he asked Chatman, W1, W2 and W3 if they had anything for pain that he was experiencing in two teeth. S1 also stated that in December 2014 and January 2015, Chatman, W1, W2 and W3 each separately gave him prescription pain medication. (Jt. Exh. 2 (par. 62); Jt. Exh. 15; Tr. 53–54.)

In light of S1's statement, Respondent re-interviewed Chatman, W1, W2 and W3 on June 4 and 5. (Jt. Exh. 2 (pars. 62–63, 69).) Chatman denied giving any prescription pain medication to S1, but stated that he suspected S1 took some prescription pain medication from Chatman's

[6] Respondent did not interview S1 on April 2, 2015, because S1 was on a leave of absence. (Jt. Exh. 2 (par. 57).)

[7] W1 admitted to providing some prescription pain medication to S1. (Jt. Exh. 11.) W2 denied knowing anything about S1 and prescription pain medication. (Jt. Exh. 13.) W3 indicated that S1 asked W3 for Tylenol in October 2014, and that S1 stated that he had been taking prescription medication for an abscessed tooth but did not have the medication with him. (Jt. Exh. 14.)

home on one occasion. Chatman also admitted that W1 told him in April 2015 that she had provided prescription pain medication to S1. (Jt. Exh. 12 (p. 4); Tr. 54–55.) W1, W2 and W3 each admitted to providing pain medication to S1 on at least one occasion. (Jt. Exhs. 11 (p. 7), 13 (p. 3); 14 (p. 3).)

On June 4, 2015, Respondent placed Chatman on paid administrative leave pending the outcome of the investigation. Respondent also withdrew Chatman's access to the protected area of the facility because Respondent did not have high assurance that Chatman was trustworthy and reliable in performing his duties. (Jt. Exh. 2 (pars. 64–65); Tr. 54, 88.)

Respondent terminated Chatman's employment on July 2, 2015.[8] (Jt. Exh. 2 (pars. 66, 68); Tr. 49–50.) In support of that decision, Respondent indicated that Chatman had an opportunity on June 4, 2015, to report issues of concern to Respondent regarding the sale of prescription medication between coworkers. Respondent added that Chatman's unwillingness to report those issues despite recent coaching "shows a lack of trustworthiness and reliability," which Respondent maintained was "particularly serious in light of [Chatman's] role as a Nuclear Security Officer" and warranted Chatman's immediate termination. (R. Exh. 2; see also Tr. 55–57, 63–65, 68–70, 77–79, 87.)

Respondent did not give the Union notice and an opportunity to bargain before placing Chatman on paid administrative leave on April 2, 2015, and on June 4, 2015, or before terminating Chatman on July 2, 2015. (Jt. Exh. 2 (pars. 58, 67).)

E. Anthony Bowen and Demetrius Brown – Investigation and Discipline

Anthony Bowen and Demetrius Brown each worked for Respondent as nuclear security officers, with Bowen starting in 2012, and Brown starting in 2003. (Jt. Exh. 2 (pars. 94–95); Tr. 57–58.)

On December 17, 2015, Bowen and Brown were involved in a physical altercation during a shift change at Plant Vogtle. Accordingly, on December 18, 2015, Respondent placed both Bowen and Brown on paid administrative leave pending the results of Respondent's investigation of the physical altercation incident. Respondent also withdrew Bowen's and Brown's unescorted access to the protected area of the facility because Respondent did not (pending investigation) have high assurance that Bowen and Brown were trustworthy and reliable in performing their duties. (Jt. Exh. 2 (pars. 96–97, 99–100); Tr. 58; see also Jt. Exhs. 20–21 (statements that Respondent obtained from Bowen and Brown during the investigation).)

On or about February 1, 2016,[9] Respondent issued both Bowen and Brown a decision making leave for engaging in a physical altercation while on site. Respondent's decisions to issue decision making leave to Bowen and Brown were discretionary. Bowen and Brown each

[8] Respondent terminated the employment of S1, W1, W2 and W3 on June 30, 2015. (Jt. Exh. 2 (par. 71.)

[9] Although the parties' joint stipulation of facts states that Bowen's and Brown's decision making leave occurred on January 19, 2016, that date appears to be erroneous. I have relied on Brown's decision making leave paperwork for the February 1, 2016 date. (Compare Jt. Exh. 2 (par. 101) with Jt. Exhs. 22–23.)

decided to return to work on February 2, 2016, and signed their respective decision making leave forms on February 3, 2016. (Jt. Exhs. 2 (pars. 101–102), 7, 22–23; Tr. 58.)

Respondent did not give the Union notice and an opportunity to bargain before placing Bowen and Brown on paid administrative leave on December 18, 2015, or before placing Bowen and Brown on decision making leave on February 1, 2016. (Jt. Exh. 2 (pars. 98, 103).)

F. Andrew Evans and Marian Whitfield – Investigation and Discipline

Andrew Evans and Marian Whitfield each worked for Respondent as nuclear security officers, with Evans starting in 1986, and Whitfield starting in 2007. In the relevant time period, both Evans and Whitfield were assigned to operate x-ray equipment at the security checkpoint in the protected area of Plant Vogtle, and were tested annually for proficiency and accuracy with the x-ray equipment. Federal regulations require nuclear security officers to identify and search all individuals for firearms except Federal, State and local law enforcement personnel on official duty and United States Department of Energy couriers who are transporting special nuclear material. (Jt. Exh. 2 (pars. 72–75, 83–86); Tr. 58.)

On January 5, 2016, a firearm passed undetected though the protected area security checkpoint that Whitfield was monitoring. Similarly, on January 6, 2016, a firearm passed undetected though the protected area security checkpoint that Evans was monitoring. (Jt. Exh. 2 (pars. 76, 87); Tr. 58–59.)

On January 7, 2016, Respondent placed both Evans and Whitfield on paid administrative leave while Respondent investigated the incidents concerning the undetected firearms. Respondent also withdrew Evans' and Whitfield's access to the protected area of the facility because Respondent did not (pending investigation) have high assurance that Evans and Whitfield were trustworthy and reliable in performing their duties. (Jt. Exh. 2 (pars. 77, 79, 88, 90); Tr. 59; see also Jt. Exhs. 16, 18 (statements that Respondent obtained from Evans and Whitfield during the investigation).)

On January 19, 2016, Respondent issued both Evans and Whitfield a decision making leave for being inattentive in their duties as the x-ray operator. Respondent's decisions to issue decision making leave to Evans and Whitfield were discretionary. Evans and Whitfield each decided to return to work on January 20, 2016. (Jt. Exh. 2 (pars. 80–81, 91–92), 17, 19; Tr. 59–60.)

Respondent did not give the Union notice and an opportunity to bargain before placing Evans and Whitfield on paid administrative leave on January 7, 2016, or before placing Evans and Whitfield on decision making leave on January 19, 2016. (Jt. Exh. 2 (pars. 78, 82, 89, 93).)

G. Gregory Biascoechea – Investigation and Discharge

Gregory Biascoechea worked for Respondent as a nuclear security officer, starting his employment with Respondent in 2009. (Jt. Exh. 2 (par. 104); Tr. 60.)

On January 11, 2016, Biascoechea reported for work at 6:00 am and was selected for drug and alcohol testing at 9:00 am. Biascoechea tested positive for alcohol with a 0.039 percent result. After the positive test for alcohol, Respondent placed Biascoechea on paid administrative leave pending investigation. Respondent also withdrew Biascoechea's unescorted access to the protected area of the facility because Respondent did not (pending investigation) have high assurance that Biascoechea was trustworthy and reliable in performing his duties. (Jt. Exh. 2 (pars. 105–106); Tr. 60.)

On January 13, 2016, Biascoechea signed a statement indicating, among other things, that he only had two 16-ounce beers the night before the positive test for alcohol, and that he finished the beers at the latest by 9:45 pm on January 10. (Jt. Exhs. 2 (par. 107), 24 (pp. 1–3); Tr. 60.)

Because it had questions about Biascoechea's explanation, Respondent, using its discretion, asked a toxicologist to review Biascoechea's alcohol test results and Biascoechea's explanation for those results. The toxicologist reviewed the matter and stated (among other things) that "it is not plausible that [Biascoechea's] breathalyzer results would be approximately 0.039% eleven hours after consuming two 16 ounce beers." (Jt. Exhs. 2 (par. 109), 25 (p. 2); Tr. 60–61, 82–84.)

On February 16, 2016, Respondent's investigators advised Biascoechea of the toxicologist's analysis and conclusions,[10] and also advised Biascoechea that the personnel who administered the breathalyzer test to Biascoechea on January 11 reported that they smelled alcohol on Biascoechea's person. Biascoechea stood by his original statement that he only had two 16-ounce beers the night before the positive test for alcohol, and that he finished the beers at the latest by 9:45 pm. (Jt. Exhs. 2 (par. 108), 24 (p. 4); Tr. 61, 84–85.)

On February 26, 2016, Respondent terminated Biascoechea's employment. In support of that decision, Respondent stated that Biascoechea: "failed to provide an adequate explanation for the positive [alcohol] test result," engaged in conduct that violated Respondent's fitness for duty policy and "caused the company to question [his] trustworthiness and reliability, which is particularly serious in light of [Biascoechea's] role as a Nuclear Security Officer." (Jt. Exhs. 2 (pars. 111, 113), 26; Tr. 60–61, 84; see also GC Exh. 2.)

Respondent did not give the Union notice and an opportunity to bargain before placing Biascoechea on paid administrative leave on January 11, 2016,[11] or before terminating Biascoechea on February 26, 2016. (Jt. Exh. 2 (par. 112).)

[10] Although the toxicologist's report about Biascoechea's alcohol test and explanation is dated February 22, 2016, the record establishes that Respondent was aware of the toxicologist's conclusions when investigators spoke to Biascoechea on February 16, 2016. (See Jt. Exhs 24 (p. 3), 25.)

[11] The parties' joint stipulation of facts does not state whether Respondent notified the Union or provided an opportunity to bargain before Respondent placed Biascoechea on paid administrative leave. (See Jt. Exh. 2 (pars. 104–113).) Based on the record as a whole, however, I have inferred that Respondent did not provide any such notice or opportunity to bargain.

DISCUSSION AND ANALYSIS

A. Witness Credibility

A credibility determination may rely on a variety of factors, including the context of the witness' testimony, the witness' demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences that may be drawn from the record as a whole. *Farm Fresh Co., Target One, LLC*, 361 NLRB No. 83, slip op. at 13–14 (2014); see also *Roosevelt Memorial Medical Center*, 348 NLRB 1016, 1022 (2006) (noting that an administrative law judge may draw an adverse inference from a party's failure to call a witness who may reasonably be assumed to be favorably disposed to a party, and who could reasonably be expected to corroborate its version of events, particularly when the witness is the party's agent). Credibility findings need not be all-or-nothing propositions — indeed, nothing is more common in all kinds of judicial decisions than to believe some, but not all, of a witness' testimony. *Farm Fresh Co., Target One, LLC*, 361 NLRB No. 83, slip op. at 14. To the extent that I have made them, my credibility findings are set forth above in the findings of fact for this decision.

B. Did Respondent Violate Section 8(a)(5) and (1) of the Act by Placing on Paid Administrative Leave, Disciplining and/or Discharging Biascoechea, Bowen, Brown, Chatman, Evans and Whitfield?

The General Counsel's sole remaining allegations in the complaint are that Respondent violated Section 8(a)(5) and (1) of the Act by placing on paid administrative leave, disciplining and/or terminating nuclear security officers Biascoechea, Bowen, Brown, Chatman, Evans and Whitfield between April 2015 and February 2016, without first notifying the Union and giving the Union an opportunity to bargain about the decisions.[12]

As the findings of fact indicate, the parties presented evidence in this case on a number of issues, including: whether Respondent exercised discretion when it determined that it did not have a high assurance that nuclear security officers were trustworthy and reliable; whether exigent circumstances permitted Respondent to place nuclear security officers on paid administrative leave, and/or discipline/discharge nuclear security officers without first notifying the Union and providing the opportunity to bargain;[13] and whether Respondent's decisions (such

[12] In the complaint, the General Counsel also asserted that Respondent violated Section 8(a)(5) and (1) of the Act by not giving the Union the opportunity to bargain about the effects of the disciplinary decisions at issue in this case. It is not clear from the record whether the General Counsel still asserts an "effects bargaining" theory. In any event, I find that any effects bargaining theory fails here (and should be dismissed) because the General Counsel did not present sufficient evidence that Respondent failed or refused to engage in effects bargaining about the disciplinary decisions in question. (See Findings of Fact (FOF), Section II(C) (noting that in June 2015 correspondence with the Union, Respondent suggested that the parties could discuss past and future discipline in the parties' early bargaining sessions).)

[13] In *Alan Ritchey*, the Board stated that "an employer may act unilaterally and impose discipline without providing the union with notice and an opportunity to bargain in any situation that presents exigent circumstances[.]" 359 NLRB No. 40, slip op. at 8; see also id. at 8–9 & fn. 19. The question of whether exigent circumstances were present in this case is moot because, as explained below, I find that the *Alan Ritchey* allegations in the complaint fail on other legal grounds.

as Respondent's decision to place the nuclear security officers on paid administrative leave) were sufficiently significant to trigger a requirement that Respondent notify and bargain with the union before taking action. I need not resolve those issues here, because as I explain below (and as I ruled recently in *Baptist Health Nursing and Rehabilitation Center, Inc.*, 2016 WL 946659, Case 03–CA–153365 (March 11, 2016)), the allegations in the complaint fail on legal grounds.

The complaint allegations in this case are based on the Board's reasoning in *Alan Ritchey*, 359 NLRB No. 40 (2012). In *Alan Ritchey*, "a three-member panel of the Board (Chairman Mark Pearce and then-Members Richard Griffin, Jr. and Sharon Block) held, inter alia, that during the period after a union is recognized but before a first contract or an interim grievance procedure is in place, an employer must bargain with the union before exercising its discretion to impose certain discipline such as suspension, demotion, or discharge." *Adams & Associates, Inc.*, 363 NLRB No. 193, slip op. at 24 (2016) (discussing *Alan Ritchey*, 359 NLRB No. 40, slip op. at 1–2, 8–10). In reaching its decision, the Board in *Alan Ritchey* overruled any contrary aspects of the decision in *Fresno Bee*, 337 NLRB 1161 (2002), a case in which the Board, without comment, adopted the judge's ruling that the employer had no obligation to notify the union and bargain before imposing discipline. *Alan Ritchey*, 359 NLRB No. 40, slip op. at 6–7 (discussing *Fresno Bee* and stating that the judge's rationale was demonstrably incorrect). However, since the Board recognized "that it had never before clearly and adequately explained that the duty to bargain over discretionary changes in terms and conditions of employment included discipline such as suspension, demotion, or discharge, the Board applied its decision [in *Alan Ritchey*] prospectively only." *Adams & Associates, Inc.*, 363 NLRB No. 193, slip op. at 24; see also *Alan Ritchey*, 359 NLRB No. 40, slip op. at 11 (explaining that the Board would apply its reasoning prospectively only, because retroactive application "could well catch many employers by surprise and, moreover, expose them to significant financial liability").

In 2014, the Supreme Court held that the recess appointments of three Board Members (including Members Richard Griffin, Jr. and Sharon Block) were invalid. *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014). As a result, several Board decisions, including the Board's decision in *Alan Ritchey*, ceased to be binding Board precedent because the Board issued the decisions when it lacked a valid quorum. The General Counsel nevertheless asserts that I should follow the Board's reasoning in *Alan Ritchey*. (See GC Posttrial Br. at 12–13.) Respondent, meanwhile, asserts that the Board's decision in *Fresno Bee* controls because *Alan Ritchey* is no longer valid precedent, and thus the decision in *Fresno Bee* remains good law. (See R. Posttrial Br. at 12–14.)

I find that Respondent has the better argument. As I stated in *Baptist Health Nursing and Rehabilitation Center, Inc.*, 2016 WL 946659, Case 03–CA–153365, slip op. at 9–10, although the Supreme Court issued its decision in *Noel Canning* on June 26, 2014, the Board has not since issued another decision to adopt or reaffirm the principles set forth in *Alan Ritchey*.[14] Perhaps such a decision is forthcoming, or perhaps not, but until the Board acts, *Fresno Bee* remains good law.[15] And, even if the Board were to issue a decision reaffirming its reasoning in *Alan*

[14] The Board's decision in *Alan Ritchey* was not appealed, and thus case was not pending when the Supreme Court issued its decision in *Noel Canning*.

[15] I have considered the General Counsel's argument that other Board decisions support a finding that an employer violates Section 8(a)(5) and (1) of the Act when it fails to bargain with a newly certified

Ritchey, it seems unlikely that the Board would apply such a decision retroactively to employers (such as Respondent here) that decided to rely on *Fresno Bee* after *Alan Ritchey* ceased to be binding precedent, given that the Board in *Alan Ritchey* applied its decision prospectively to avoid catching employers by surprise. For these reasons, I will apply *Fresno Bee* to this case. See *Adams & Associates, Inc.*, 363 NLRB No. 193, slip op. at 1, 25 (a recent decision in which the Board reviewed and adopted much of the judge's decision, but did not comment on the judge's observation that "it would work an injustice to require [the employer] to adhere to *Alan Ritchey*" regarding three discharges that occurred when the *Alan Ritchey* decision could not be relied upon due to the Supreme Court's decision in *Noel Canning*); see also *Oberthur Technologies of America Corp.*, 2016 WL 3361188, Case 04–CA–128098, slip op. at 6 (June 16, 2016) (Amchan, J.); *Lifeway Foods, Inc.*, 2015 WL 9301369, Case 13–CA–146689, slip op. at 20–21 (Dec. 21, 2015) (Carissimi, J.); *Ready Mix USA, LLC*, 2015 WL 5440337, Case 10–CA–140059, slip op. at 31–33 (Sept. 15, 2015) (Goldman, J.); *High Flying Foods*, 2015 WL 2395895, Case 21–CA–135596, slip op. at 32 (May 19, 2015) (Muhl, J.); *McKesson Corp.*, 2014 WL 5682510, Case 12–CA–094552, slip op. at 33 (Nov. 4, 2014) (Locke, J.).

I find that under *Fresno Bee*, Respondent did not have a duty to notify and bargain with the Union before: placing Biascoechea, Bowen, Brown, Chatman, Evans and Whitfield on paid administrative leave in 2015 and 2016; placing Bowen, Brown, Evans and Whitfield on decision making leave in 2016; or discharging Biascoechea (in 2016) and Chatman (in 2015).[16] Accordingly, I recommend that the remaining allegations in the complaint (i.e., the allegations that have not been resolved via settlement) be dismissed. To the extent that the parties presented arguments in their briefs about what remedies might be appropriate in a case such as this one (see GC Posttrial Br. at 22–26; R. Posttrial Br. at 18–21), those arguments are moot.

CONCLUSIONS OF LAW

The General Counsel has failed to prove that Respondent violated Section 8(a)(5) and (1) of the Act by failing to notify and bargain with the Union before placing on paid administrative leave, disciplining and/or terminating nuclear security officers Biascoechea, Bowen, Brown, Chatman, Evans and Whitfield between April 2015 and February 2016.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[17]

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union before imposing discretionary discipline during the interim period between the union's certification and the parties' first collective-bargaining agreement. (GC Posttrial Br. at 20–21 (collecting cases).) It suffices to observe that, at most, the General Counsel's argument that other Board decisions conflict with *Fresno Bee* merely begs the question about the extent of an employer's duty (if any) to notify and bargain with a union before imposing discipline under the circumstances presented here. That is a question for the Board to resolve if it chooses.

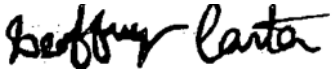
[16] These findings stand even if I assume, arguendo, that Respondent exercised discretion when it decided to take these actions.

[17] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The complaint is dismissed.

Dated, Washington, D.C. August 16, 2016



GEOFFREY CARTER
Administrative Law Judge